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No. 88-1338

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM C. POLLARD,
Cross-Petitioner,

v.

MARTIN MARIETTA CORPORATION,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MARTIN MARIETTA'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

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13 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE CROSS-PETITION	5
THERE IS NO REASON WHY THIS COURT SHOULD ADDRESS ISSUES NOT CONSIDERED BY THE COURTS BELOW	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	6
Federal Trade Commission v. Grolier, Inc., 462 U.S. 19 (1983)	6
Hickman v. Taylor, 329 U.S. 495 (1947)	7
Jenkins v. Anderson, 447 U.S. 231 (1980)	6
United States v. Nobles, 422 U.S. 225 (1975)	7, 8
Youakim v. Miller, 425 U.S. 231 (1976)	6
FEDERAL RULES	
Fed. R. Crim. P. 26(b)(3)	9
Fed. R. Crim. P. 17(c)	*passim*
Fed. R. Evid. 501	7

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COUNTERSTATEMENT OF THE CASE

None of the questions presented by the Cross-Petition were raised below or decided by the Court of Appeals. If those questions ever need be decided at all, they are better addressed on a complete record in the lower courts before being pursued in this Court. In short, while the important questions presented in the main petition (No. 88-1157), whether (as the courts below determined) any privileges protecting Martin Marietta's documents were waived by a submission to the prosecutor, should be decided now, there will be time enough to consider the questions raised by the Cross-Petition on remand.

The district court's decision enforcing the subpoena rested solely on the court's conclusion that Martin

Marietta[1] had broadly waived its attorney-client and work product privileges by submitting a position paper to the United States Attorney. Cross-Petition App. 30a-33a. The Court of Appeals substantially sustained that position. The Court of Appeals did not question the general applicability of the privileges to the documents in question (for Pollard did not challenge it on appeal), but held that there had been a waiver on the basis of one event, and one event only: the submission of a position paper and its supplement to the federal government. It was on this basis alone that the Court of Appeals ordered the documents in question to be provided to Pollard. Cross-Petition App. 12a.

In the Court of Appeals, Pollard argued only waiver.[2] The only waiver that was argued was the waiver said to arise from the submission of the position paper to the federal government. *See* Cross-Petition App. 6a. Stated conversely, Pollard raised none of the questions that he now seeks to present by this Cross-Petition. The Court of Appeals never, impliedly or otherwise, passed on those questions.[3]

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[1] Martin Marietta's Rule 28.1 statement was filed with this Court with its request to enlarge the time to petition in No. 88-1157.

[2] The only other issues briefed by the parties and addressed by the Court of Appeals involved the question whether the subpoenaed documents met the general standards of Fed. R. Crim. P. 17(c). It was in this context that Pollard spun a series of factual theories that he now recites as fact and invoked his Sixth Amendment rights. The Court of Appeals held that these materials were subject to a Rule 17(c) subpoena. Although Martin Marietta respectfully maintains its disagreement with the panel's opinion on the Rule 17(c) issue, it recognizes that the Court of Appeals' error might not independently warrant a grant of certiorari. The issue of implied waiver of the attorney-client and work product privileges is, however, an issue of substantial and widespread concern.

[3] For the convenience of the Court and to avoid any improvident grant of the Cross-Petition, Martin Marietta has requested a copy of Pollard's brief in the Court of Appeals be transmitted to this Court pursuant to this Court's Rule 19.

In support of the Cross-Petition, Pollard has set forth an extended statement of the case, relying almost entirely on extra-record materials. There is no need to catalogue all of the assertions of purported fact for which no record support is or could be cited, the quotations from items of evidence not part of the record on appeal [4], the instances in which cross-petitioner has cited to his own brief in the court below as the sole support for some alleged fact [5], the fictive citations to cross-petitioner's own Appendix [6], or arguments for which a conclusion of fact is stated, but no such conclusion is found in the decision of the Court of Appeals.[7]

One factual ambiguity created by the Cross-Petition may warrant clarification. While Pollard refers repeatedly to "lawyers" and "lawyers panicking," and lawyers

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[4] *E.g.*, Cross-Petition at 8-12 nn.4 and 5. Those transcripts were never provided to Martin Marietta and were never part of the record on appeal. To be sure, Pollard employed the same technique of quoting documents not of record in his brief to the Court of Appeals. The Court of Appeals relied upon *none* of those extra-record assertions in rendering its decision.

[5] *E.g.*, Cross-Petition at 4.

[6] For example, Pollard asserts that "attorneys, principally Elliot [sic] Light, who reported directly to senior Martin Marietta management," created the fraudulent scheme, a proposition for which the Cross-Petition appears to cite "App [sic] 37a, 46a)." *See* Cross-Petition at 6. The first citation is to the indictment, which nowhere mentions Mr. Light; the second citation is to a portion of Pollard's own brief in the district court, which also fails to mention Mr. Light.

[7] Pollard states in a footnote that "a broad subject matter of attorney client communication and work product was made available to the Government and the Grand Jury," Cross-Petition at 9 n.4, quoting an excerpt from a grand jury transcript. The Court of Appeals found no such broad disclosure and rested exclusively on the alleged waiver of both privileges said to arise from the submission of the position paper. The district court found waiver on the same theory.

being part of a conspiracy, the plain facts are that the investigation began, and all the documents at issue were generated, *after* the criminal activity alleged in the indictment ended. The internal "audit" documents at issue, as well as attorney notes, memoranda and transcripts, were prepared following the publication of an October 1984 article in the newspapers exposing Pollard's activities—what the Cross-Petition refers to as the "Anderson Article." Cross-Petition at 6. Outside counsel was retained in November of 1984.[8] Cross-Petition App. 53a. Although the indictment references a scheme to defraud extending from about November 1983 to "about" November 1984, the *last* overt act charged is Pollard's alleged order to "destroy any incriminating evidence in the Maxim files" in "September 1984." Cross-Petition App. 40a.

Thus, despite the possible jury appeal of alluding ambiguously to conspiracies by lawyers, the internal investigation (and the privileged documents which it generated) began at the time of the publication of an article in the newspapers; that same article necessarily marked the end of the alleged covert scheme. There is nothing in the indictment that suggests or intimates in any way that the investigatory efforts of the attorneys following disclosure of the scheme was in any way related to the crimes charged.[9]

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[8] Martin Marietta claimed privilege with respect to only a few attorney and other notes generated in October 1984, prior to retention of outside counsel. The notes of outside counsel and transcripts of interviews conducted by outside counsel after November 1984 primarily compose the documents at issue here.

[9] Pollard refers to the Court of Appeals' ambiguous statement in connection with the Rule 17(c) issue that "[s]ince Pollard did not have direct contact with the DOD, the charge against him for defrauding the DOD is essentially a charge that he obstructed Martin Marietta's corporate internal audit of its subsidiary Maxim." Cross-Petition at 14. This statement was not relied upon by the Court of Appeals in finding waiver. The Court of Appeals was

REASONS FOR DENYING THE CROSS-PETITION

The main petition, No. 88-1157, presents questions arising from the issues briefed, argued and actually decided by the courts below: Whether or to what extent Martin Marietta's attorney-client and work product privileges were waived by Martin Marietta's submission of a position paper to the United States Attorney. The Court of Appeals held that whatever privileges attached to the documents in question, those privileges were waived. On that basis alone, the Court of Appeals sustained the district court's order that sundry privileged documents be produced to Pollard in response to his Rule 17(c) subpoena. In contrast, relying on extra-record assertions of fact, the Cross-Petition presents a series of arguments never presented to the courts below—and certainly not addressed by either court.

That the theories raised by the Cross-Petition were not addressed by the courts below is sufficient reason to deny the Cross-Petition. Moreover, those theories do not bear upon the issue of waiver. In fact, while the questions presented by the main petition were actually decided below, and the general issues raised by the main petition have previously been addressed (albeit inconsistently) by several lower courts, the issues raised by the Cross-Petition have, to all appearances, never before been addressed by any court in this case—or in any other.

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paraphrasing the district court, which had noted Pollard's *argument* that "Since defendant did not have any direct contact with DCAA auditors, he is essentially charged with obstructing MMC's corporate internal audit . . . ." Cross-Petition App. 22a.

A review of the indictment shows that Pollard's characterization of the case was neither correct nor relevant. Pollard is plainly not charged with obstructing Martin Marietta's internal audit to the extent that audit postdated the Anderson article; nor is he charged with obstruction of any of the other investigative efforts of Martin Marietta in preparation for litigation. That is simply not part of any fraud charged in the indictment. In any event, the issue was not raised or discussed by the Court of Appeals in connection with its finding of waiver.

If, by failing to raise these issues at the outset, Pollard has not already waived his right to pursue them (an issue for the courts below to determine), they should first be addressed on remand from No. 88-1157.

THERE IS NO REASON WHY THIS COURT SHOULD ADDRESS ISSUES NOT CONSIDERED BY THE COURTS BELOW

Only in the most exceptional cases will this Court address issues that have been neither raised nor decided by the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Air Lines, Inc. v. August*, 450 346, 362 (1981). The Court particularly disfavors addressing issues that may rest on factual issues that have not as yet been resolved by the district court. *See Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980). Indeed, in a case similar to the present one, the Court declined to address respondent's argument that the work product privilege should not apply on a ground that had not been raised below. *Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983). No exceptional circumstances are present in this case to warrant a departure from this general rule, particularly because the questions are novel and depend in part on facts not presented to the district court or part of the record in this Court.

Pollard's Cross-Petition does not offer legal theories to support the finding of waiver by the courts below.[10] Instead, he argues generally that the work product privilege cannot bar the production of material that is otherwise properly subject to a defense subpoena issued under Fed. R. Crim. P. 17(c) because (1) such a rule would impinge upon a defendant's Sixth Amendment right to

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[10] A finding of waiver has very different implications than a finding for example, that work product does not apply in the context of a Rule 17(c) subpoena or that, in light of some compelling need, the claim of work product should be overridden with respect to some document.

compulsory process, Cross-Petition at 16-20; (2) the Federal Rules of Evidence deprive the federal courts of authority to "create" a work product rule that would apply to limit the introduction of evidence in the courtroom, Cross-Petition at 21-23; and (3) the work product rule was "never intended" to apply to admissible evidence.[11] Cross-Petition at 23-25.

With respect to the first argument, Pollard recognizes that a defendant's Sixth Amendment right to compulsory process has ordinarily been regarded as subject to ordinary rules of evidence and procedure. Cross-Petition at 17.

With respect to the second argument—that the Federal Rules of Evidence limit the authority of the federal courts to create and apply work product restrictions in an evidentiary setting, Cross-Petition at 21-23—this Court has already concluded that work product protection extends beyond "discovery," and rises to the level of a "qualified privilege," *United States v. Nobles*, 422 U.S. 225, 237 (1975), to restrain the evidentiary use of work product at trial. *Id.* at 239 ("Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of the case"). The Federal Rules of Evidence expressly authorizes the federal courts to determine privilege questions by resort to "principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Fed. R. Evid. 501. Pollard cites no case of this Court or any other suggesting that this grant of authority was really a limitation on this Court in interpreting and applying the work product privilege recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947), 25 years before the Federal Rules of Evidence were adopted.

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[11] As pointed out above, Pollard also intimates that there were other waivers of the work product privilege not found or considered by the courts below. *See, e.g.*, Cross-Petition at 9 n.4.

In support of the third argument, that the work product rule should not be an evidentiary privilege applicable to the introduction of relevant and admissible testimony at trial, Pollard relies upon the concurring opinion in *United States v. Nobles*, 422 U.S. 225, 242 (1975) (White, J., concurring). But it is unlikely that the theory set forth in the concurring opinion would extend to these facts:

(a) This petition does not involve an attempt to introduce evidence at trial. Instead, we have a Rule 17(c) subpoena issued long before trial in an attempt to gather *potentially* relevant and *potentially* admissible material. Even the concurring opinion in *Nobles* stated that material sought for preparation purposes is not sufficient to overcome work product protection. 422 U.S. at 252 n.12. The court below assuredly has not determined whether any of the material would actually be admissible at trial, sufficient to overcome hearsay and materiality objections, or that any given document is relevant for impeachment of some witness' testimony.[12] In fact, even the concurring opinion in *Nobles* recognized that there is grave potential danger in allowing *attorney* generated documents to be used as courtroom evidence. 422 U.S. at 252-53 (White, J., concurring). Most of the documents at issue here fall squarely in that category.

(b) The concurring opinion in *Nobles* found few cases in which the issue of the evidentiary use of attorney work product in the courtroom had arisen. 422 U.S. at 246-47. It is fair to say that the reason that the issue rarely arises is because (1) work product is not ordinarily available through discovery and, therefore, it does not often find its way into the courtroom, and (2) it has

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[12] The Court of Appeals held only that the trial court did not abuse its discretion in determining that Pollard's Rule 17(c) subpoena was a "good faith" effort to obtain evidentiary material—not that any specific item covered was admissible as evidence in Mr. Pollard's trial. Cross-Petition App. 5a.

been assumed to be inadmissible. As the tone of the Cross-Petition in this case makes clear, however, if attorney work product were even arguably subject to evidentiary use, these issues would arise with frequency, for the temptation to inject the lawyers into the courtroom is great. Statements made by attorneys and witnesses in the course of trial preparation would inevitably be grist for colorful cross-examination.

Thus, the issues raised by this Cross-Petition assuredly have broad implications, but scant support. Their breadth only emphasizes why this Court should not address them now without allowing the lower courts to address them first. By their terms, they do not go to the question of waiver as found by the courts below. Whether there were any other waivers of the work product privilege, or whether the privilege does not apply to some or all of the documents, should be determined on an evidentiary record by the district court. And the issues raised about Pollard's Sixth Amendment rights and the need for particular materials as those needs emerge at trial, are arguably subsumed by the existing "substantial need" test for obtaining work product (*see* Fed. R. Civ. P. 26(b)(3))—a test that neither the district court nor the Court of Appeals had occasion to reach in this case, having found waiver instead.

In this Court, the question actually decided below—whether a submission to the United States Attorney of the kind made here waives the attorney-client and work product privileges for the attorneys' underlying investigative materials—is squarely presented by the petition in No. 88-1157. That question can and should be decided without reaching the issues raised by the Cross-Petition.

CONCLUSION

The Cross-Petition should be denied.

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